

IN THE MATTER OF THE CONSIDERATION OF A CEASE AND DESIST ORDER AGAINST WOODS IRRIGATION COMPANY FOR UNAUTHORIZED DIVERSION OF WATER FROM THE SACRAMENTO–SAN JOAQUIN DELTA IN SAN JOAQUIN COUNTY

DIVISION OF WATER RIGHTS PROSECUTION TEAM EXHIBIT 01 (PT-01)

JOINT WRITTEN TESTIMONY OF CHARLES ARNOLD, WATER RESOURCES CONTROL ENGINEER AND MARK STRETARS, SENIOR WATER RESOURCES CONTROL ENGINEER

Introduction

Charles Arnold is a staff engineer with the State Water Resources Control Board, Division of Water Rights. He has worked in the Division of Water Rights for 5 years in the Compliance and Enforcement Unit. A copy of his resume is attached as Division Prosecution Team Exhibit PT-02. Mr. Arnold was given the task of evaluating the Woods Irrigation Company's (Woods) diversion of water from Middle River in San Joaquin County and to determine if a basis of right exists.

Mark Stretars is a professional Engineer, registered in California, and a Senior Water Resource Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). He has 35+ years of experience in California water rights working for the Division in programs dealing with water right application acceptance, protest and hearing actions, complaint and compliance actions, and petitions for change and transfers of water. He is currently the Chief of the Compliance and Enforcement Unit. A copy of his resume is attached as PT-03.

The joint testimony, herein provided, identifies the personal knowledge of the evidence and actions leading to the Division's recommendation to issue the draft Cease and Desist Order against the Woods.

Investigation into whether Woods Irrigation Company is making unauthorized diversions of water from the Sacramento–San Joaquin Delta:

On July 16, 2008, the State Water Board adopted a Strategic Workplan Plan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan). The Workplan emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta.

On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta. (PT-04.) The Division requested that each property owner either: inform the Division within 60 days as to the basis of their right to divert

water by filing a Statement of Water Diversion and Use with appropriate evidence; define a contractual basis for diversion of water; or cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action.

On March 4, 2009, Woods submitted evidence claiming a 1911 non-statutory appropriative water right to divert water from Middle River to lands within and upon Roberts Island at a rate of up to 77.7 cubic feet per second (cfs). (PT-05) The 1909 and 1911 documents identify the amount, purpose of use, place of use, and a plan for irrigation development. The 1911 documents also indicate that a portion of the diversion system was installed prior to 1911. Based on subsequent mapping and evaluation of the documentation, Division staff concluded that it was likely that the 77.7 cfs was developed under the claimed pre-1914 right. Woods did not provide a Statement of Water Diversion and Use with its submittal. Staff also received information from property owners within the Woods' apparent service area claiming riparian rights and pre-1914 appropriative rights to Middle River. These property owners identified in their statements that they are being served by Woods, through Woods' diversion facilities. No evidence was provided to support these other pre-1914 and riparian claims.

On April 20, 2009, Division staff requested that Woods provide delineation of the current area served and the amount of water delivered under the pre-1914 water right. The Division received correspondence from Woods dated June 16, 2009, but the correspondence did not include the requested place of use or the diversion information.

On July 30, 2009, Division staff conducted an onsite inspection of the Woods system and met with Woods' counsel and directors. Division staff made a subsequent inspection of the Robert's Island area on August 4, 2009, during which staff took measurements of the flows being diverted into Woods' two main irrigation canals using stream flow measuring equipment. The combined flow of the two canals measured by staff totaled approximately 90 cfs. (PT-06) This rate exceeded the maximum diversion rate of 77.7 cfs claimed by Woods as its pre-1914 water right.

On October 22, 2009, the Division requested that Woods present, within 30 days, a list of the riparian parcels that Woods serves on behalf of the property owners, through its diversion works. Woods was again requested in accordance with the Division's letter of February 18, 2009, to complete and submit Statements of Water Diversion and Use for its points of diversion that provide water within the Woods service area.

As of December 28, 2009, Woods had not submitted:

- the requested Statements of Water Diversion and Use,
- the requested current place of use delineation,
- a listing of riparian parcels being served within the Woods' place of use,
- information regarding current diversion and use of water, or
- justification for the 90 cfs diversion rate that was measured on August 4, 2009 that is in excess of 77.7 cfs claimed by Woods.

In accordance with Water Code sections 1831 -1836, the Division issued a Notice of Draft Cease and Desist Order (CDO) against Woods, dated December 28, 2009 (PT-07). The draft Cease and Desist Order required Woods to cease and desist from diversion and use of water in excess of 77.7 cfs until:

- sufficient evidence establishing a valid basis of right or a water supply contract to serve any excess water to Woods' service area has been approved.
- Statements of Water Diversion and Use are filed for all points of diversion used by Woods.

Additionally Woods was directed to develop a monitoring plan that includes the installation of measuring devices to identify the amounts of water diverted and used within the service area of Woods and an operators manual describing how, when and where those measuring devices shall be read and recorded. If Woods disagreed with the facts or time schedules for the corrective actions set forth in the Notice of Draft CDO, Woods was directed to request a hearing before the State Water Board no later than 20 days from the date of receipt of the notice. On January 11, 2009, counsel for Woods requested a hearing. (PT-08)

Aftermath of the Issuance of the Notice of CDO:

Following issuance of the Notice of Draft CDO, on January 5, 2010, counsel for Modesto Irrigation District (MID) sent an email (PT-09) and attachments pointing to a 1958 California Supreme Court case, *Woods Irrigation Company v. The Department of Employment* (1958) 50 Cal.2d 174 [323 P.2d 758] (PT-10), which MID suggested raised questions about the Division's conclusion that a valid pre-1914 water right for 77.7 cfs appeared to exist. (PT-09)

Division staff reviewed the Supreme Court decision and MID's concerns and concluded that the case did not provide sufficient reliable evidence to refute the Division's opinion regarding a pre-1914 basis of right for the diversion of water into Woods' service area. Specifically, papers of incorporation were filed in 1909 on behalf of Woods Irrigation Company, "To acquire water and water rights and lands and rights of way for the purpose of constructing, operating and maintaining ditches for irrigation of the lands of the stockholders of said Corporation...." (PT-05) The stockholders at the time were E.W.S. Woods, Alice M. Woods, Jessie Lee Wilhoit and Mary L. Douglass, who held ownership to the lands currently identified within Woods' service area. In September of 1911, agreements were recorded between the above named parties and Woods Irrigation Company indicating that Woods would supply water in the amount of up to 77.7 cfs to the lands of the four parties. (PT-05) These lands have now been split into numerous smaller properties; the owners of these parcels each apparently holding shares in the Corporation. (PT-11)

The issue that was the focus of the 1958 California Supreme Court case appears to have been workers compensation, and not the existence or validity of water rights. In the Supreme Court decision, the issue of water rights held by Woods is mentioned only once, in the opening description of Woods. The Court stated

[Woods] is a nonprofit California corporation, engaged in furnishing irrigating and drainage services to land owned by its farmer shareholders. It owns no land or water rights of its own but instead maintains its pumping stations, canals and coordinating irrigating and drainage facilities on the property of its shareholders, from whom it has received grants of easements in perpetuity.

(PT-10; *Woods Irrigation Co. v. Department of Employment, supra*, 50 Cal.2d at p. 176.)

Wells A. Hutchins, in *The California Law of Water Rights* (1956), states under the heading "Mutual Company Service Distinguished,"

Persons who hold water rights individually and who form a corporation and delegate thereto the function of handling the diversion and distribution facilities, reserving to themselves their water rights, do not thereby dedicate or appropriate to public use the water thus reserved and used by themselves. [Citations omitted.] And even if in such case the holders convey their water rights to the company for the mere purpose of convenience in management and distribution of the water to such holders according to their respective rights, there is no severance of the right from the land to which it was appurtenant. [Citations omitted.] The right is simply held thereafter under a formally different title.

(Hutchins, *The California Law of Water Rights*, p. 153.)

Based on the above, Division staff still concludes that regardless of whether Woods holds the rights or the shareholders themselves hold the rights, a plan was consummated in 1909, water has been served to some acreage within the Woods service area since at least 1911, and water was developed to the originally identified amount of 77.7 cfs. However, formal evidence outlining all bases of right under which Woods claims its diversions and how water is delivered pursuant to any particular basis of right has not been submitted to the Division. Without such information, it is impossible for the Division to determine whether all of Woods' diversions are covered by valid water rights.

Conclusion:

The Division finds that Woods has not submitted evidence to substantiate claims to riparian rights and pre-1914 rights in excess of the 77.7 cfs. Acceptable information supporting a valid basis of right could include, but is not limited to; evidence supporting preservation of riparian rights for parcels within Woods' service area currently served by Woods, or evidence which verifies irrigation on the parcels prior to 1914 and documents the subsequent continuous use of water thereafter above the aforementioned 77.7 cfs.

Additionally, Woods has yet to file any statements, and although some of Woods' shareholders have submitted Statements claiming pre-1914 and riparian rights, they identify that they are being served by Woods. Therefore, it is unclear if additional rights exist, which rights are being exercised, and in what amounts. If Woods is exercising its shareholders' rights, every one of the shareholders may need to file a statement for the rights they claim.